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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, DOROTHY MILLER, FORESTINE PRESSY, individually, and on behalf of their minor children and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

NEW YORK STATE EDUCATION DEPARTMENT, EWALD B. NYQUIST, as Commissioner of the New York State Education Department, and the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 27, Town of Hempstead,

Defendants-Appellants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ~~APPELLANTS~~ PETITIONERS

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INDEX

TABLE OF CITATIONS AND AUTHORITIES iii
OPINION BELOW 1
JURISDICTION OF THIS COURT 2
CONSTITUTIONAL PROVISIONS 2
STATUTES INVOLVED 2
QUESTIONS PRESENTED 4
STATEMENT OF THE CASE: 4
A. The Legislative History of Statutory Provisions 4
B. The Ultimate Facts 5
C. The History of These Proceedings 6
SUMMARY OF ARGUMENT 8
ARGUMENT: 10
POINT I. APPELLANTS' CHILDREN WERE DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT WHEN THEY WERE DENIED TEXTBOOKS ESSENTIAL TO THEIR PUBLIC SCHOOL EDUCATION SOLELY BECAUSE OF THEIR POVERTY 10
A. The Statutory Scheme for the Distribution of Textbooks Divides Children into Two Classes and Denies Equal Public Education to Children in Grades 1-6 Solely on Account of their Poverty 10
B. The Equal Protection Clause Requires that the Burdening of a Fundamental Interest be Justified by a Standard of Compelling Interest 11
1. Education is a Fundamental Interest and the *Sine Qua Non* of Useful Existence 12

2. Education is Preservative of All Other Fundamental Basic Civil and Political Rights. 18

3. Those Subject to the Deprivation Created by the Statutory Scheme Comprise a Politically Impotent Class Requiring this Court's Special Protection 20

4. The Statutory Scheme Creates Classification of Children Based on Conduct of their Parents Over Which they Have no Control 22

C. The Equal Protection Clause Forbids Economic Discrimination in the Enjoyment of Fundamental Interests 23

D. The Proffered State Interests Fail To Justify the Denial of Equal Educational Opportunity 29

1. The Desire to Provide Textbooks to as Many Children as Possible 32

2. The Denial of Textbooks to Indigent Children in Grades 1-6 Conserves Fiscal Resources 33

3. The Denial of Textbooks to Indigent Children in Grades 1-6 Fosters the Study of Certain Subjects in Grades 7-12 35

POINT II. INDIGENT CHILDREN DENIED TEXTBOOKS BY THE STATUTORY SCHEME ARE DEPRIVED OF THEIR RIGHT TO ACQUIRE KNOWLEDGE WITHOUT DUE PROCESS OF LAW 37

POINT III. THE COURT BELOW ERRONEOUSLY FOUND THE CONSTITUTIONAL QUESTION INSUBSTANTIAL BY APPLYING AN UNDULY RESTRICTIVE STANDARD IN CONFLICT WITH THE GUIDELINES ESTABLISHED BY THIS COURT 43

A. The Court Below Applied a Standard in Conflict with an Unbroken Line of Decisions of this Court 44

B. The Court Below Erroneously Applied this Court's Ruling in *Dandridge v. Williams*, 397 U.S. 471 in Rejecting Appellants' Equal Protection Claim 49

CONCLUSION 52

TABLE OF AUTHORITIES

Cases Cited:

Abington School District v. Schempp, 374 U.S. 203 (1963) ... 12

Askew v. Hargrave, 401 U.S. 476 (1971) 46

Barnette v. West Virginia Board of Education 319 U.S. 624 (1943) 37

Blocker v. Board of Education, 226 F. Supp. 208 (E.D.N.Y. 1964) 31

Board of Education v. Allen, 392 U.S. 236 (1968) 12, 16, 35

Boddie v. Connecticut, 401 U.S. 371 (1971) ..... *passim*

Bolling v. Sharpe, 347 U.S. 497 (1954) 41

Brown v. Board of Education, 347 U.S. 483 (1954) ..... *passim*

Bullock v. Carter, 92 S. Ct. 849 (1972) 33

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California Water Service Co. v. City of Redding, 304 U.S. 252 (1938) 44

Carrington v. Rash, 380 U.S. 89 (1965) 33

Chandler v. South Bend Community School Corporation, CA No. 71 S51 (ND IND. 1971) 49

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Dandridge v. Williams, 397 U.S. 471 (1970) 49, 50

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Dunn v. Blumstein, 92 S. Ct. 995 (1972) 30, 31

Edwards v. California, 314 U.S. 160 (1941) 23

Eskridge v. Washington State Board of Prison T. & P.
357 U.S. 214 (1958) 25

Gardner v. Toilet Goods Association,
387 U.S. 167 (1967) 7

Graham v. Richardson, 403 U.S. 365 (1971) 20, 33, 51

Griffin v. Illinois, 351 U.S. 12 (1956) 9, 24, 40, 51

Griswold v. Connecticut, 381 U.S. 479 (1965) 19, 37, 38

Gulf, Colorado & Sante Fe Ry. v. Ellis,
165 U.S. 150 (1897) 29

Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970) 46

Hargrave v. McKinney, 413 F. 2d 320 (5th Cir. 1969) 46, 48

Harper v. Virginia State Board of Elections,
383 U.S. 663 (1966) 19, 22, 26, 50

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) 16, 21

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Idlewild Bon Voyage Liquor Corp. v. Epstein,
370 U.S. 713 (1962) 44

Interstate Consolidated Railway Co. v. Massachusetts,
207 U.S. 79 (1907) 13

Jackson v. Choate, 404 F. 2d 910 (5th Cir. 1968) 47

James v. Valtierra, 402 U.S. 137 (1971) 42

Johnson v. New York Education Department,
449 F. 2d 871 (2nd Cir. 1971) 1

Kent v. Dulles, 357 U.S. 116 (1958) 38

Keyishan v. Board of Regents, 385 U.S. 589 (1967) 16

Korematsu v. United States, 323 U.S. 214 (1944) 22

Kramer v. Union Free School District,
395 U.S. 621 (1969). 11, 30, 31, 37

Lane v. Brown, 372 U.S. 477 (1963) 25

Lassiter v. Northampton County Board of Elections,
360 U.S. 45 (1959) 19, 27

Levy v. Louisiana, 391 U.S. 68 (1968) 22

Long v. District Court of Iowa, 385 U.S. 192 (1966) 25

Lovell v. City of Griffin, 303 U.S. 444 (1938) 19

Loving v. Virginia, 388 U.S. 1 (1967) 19

Mayer v. Chicago, 404 U.S. 189 (1971) 29

McDonald v. Board of Elections Comm., 394 U.S. 802 (1969) 27

McGowan v. Maryland, 366 U.S. 420 (1961) 11

McLaughlin v. Florida, 379 U.S. 184 (1964) 22

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Meyer v. Nebraska, 262 U.S. 390 (1923) ..... *passim*

Miller v. New York Stock Exchange, 425 F. 2d 1074 (2nd Cir. 1970), cert. den. 398 U.S. 905 (1970) 46

NAACP v. Alabama, 357 U.S. 449 (1958) 19

NAACP v. Button, 371 U.S. 419 (1963) 31

Oyama v. California, 332 U.S. 633 (1948) 22

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 39

Poe v. Ullman, 367 U.S. 497 (1961) 38

Poresky, Ex parte, 290 U.S. 30 (1933) 10, 44, 48

Protestants and Other Americans United for Separation of Church and State v. United States, 435 F. 2d 627 (6th Cir. 1970) 46

Richards v. United States, 369 U.S. 1 (1961) 35

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Skinner v. State of Oklahoma, 316 U.S. 535 (1942) 38

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Williams v. Illinois, 399 U.S. 235 (1970) 28, 34
Williams v. Page, 309 F. Supp. 814 (N.D. Ill. 1970) reversed No. 18536 (7th Cir. 1971) [unreported], cert. den. 404 U.S. 1005 (1972) 46, 49
Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 11
Wisconsin v. Constantineau, 400 U.S. 433 (1971) 41

Constitutional Provisions:

United States Constitution
First Amendment 3
Ninth Amendment 3
Fourteenth Amendment ..... *passim*

New York State Constitution
Article XI, Section 1 3

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20 U.S.C. §§ 234-244 .....
20 U.S.C. §§ 331-332 .....
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25 U.S.C. §§ 452-454 .....

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2281 ..... 10, 43, 45
28 U.S.C. § 2284 43
Northwest Ordinance of 1787 38

New York Statutes:

New York Education Law § 701 ..... 2, 4, 5, 35
New York Education Law § 701(2) 2, 16, 40
New York Education Law §703(3) 2
New York Education Law § 703 ..... 3, 4, 32
New York Education Law §703(1) 3
New York Education Law §703(2) 3
New York Education Law § 2023 ..... 5, 32
New York Education Law § 2503(7) 4
New York Education Law § 2554(7) 4
New York Education Law § 3205(1) 14
New York Election Law §150 19
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18 NYCRR §352.5(d) 6

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANTS

OPINION BELOW

The Opinion of the Court of Appeals (A-59-81)* is reported at 449 F.2d 871 (1971)

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*Numbers in parenthesis preceded by "A" refer to pages of the Appendix.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered August 13, 1971. The petition for a Writ of Certiorari was filed November 6, 1971 and was granted February 22, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

New York Education Law § 701 in pertinent part, provides:

> "2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.
>
> 3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be

textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustee or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities."

* * * * *

New York Education Law § 703 provides in pertinent part:

"1. The qualified voters of any school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all text-books used, or to be used, by pupils enrolled in grades one to six, inclusive, in the schools of the district.

2. If such tax shall be voted, it shall be the duty of the board of education or trustees of such district, within ninety days thereafter, to purchase and furnish free, text-books to all the pupils in grades one through six inclusive attending the schools in such district. [Notwithstanding the provisions of subdivision one of this section, where the qualified voters have failed, neglected or refused to authorize free distribution of textbooks, the board of education or trustees of the district may, within its discretion, purchase textbooks and either rent or sell the same to pupils in grades one through six, inclusive, attending the schools in such district]** Such board of education or trustees shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary."

**Matter in brackets [ ] was approved and became effective June 22, 1971, Laws of 1971, ch. 699.

QUESTIONS PRESENTED

(1) May New York State constitutionally deny indigent children textbooks essential for required instruction solely because of their inability to pay rental fees?

(2) Have petitioners raised a substantial constitutional claim requiring that a three judge court be convened?

STATEMENT OF THE CASE

A. The Legislative History of Statutory Provisions

Prior to 1965, the New York legislative scheme for distributing textbooks provided that they were to be distributed free to children in all grades of public schools only when authorized by the voters of the district. [Laws 1947, c. 820].

In 1965, the New York State Legislature amended Section 701 of the Education Law [Laws 1965, c. 320] to require local public school authorities to purchase and loan textbooks free of charge to all pupils in grades 7-12 in public and private schools. No similar mandatory provision was established for the distribution of textbooks free of charge to children in grades one through six. Instead, § 703 of the Education Law was amended [Laws 1965, c. 320] to authorize the qualified voters of local school districts to vote a tax for the purchase of textbooks, and if voted, requires the local school board to purchase and furnish textbooks free to all pupils in grades one through six attending the schools in said districts.[1]

[1] The complete scheme for distributing textbooks includes provisions for the distribution of textbooks to pupils attending schools in city school districts. As to school districts in cities of less than 125,000 population, §2503 (7) of the Education Law provides that Boards of Education *may*, without authorization by the voters, provide textbooks to children attending school in the district. As to school districts in cities of over 125,000 population, §2554 (7) of the Education Law provides that Boards of Education of a city which provided free textbooks to pupils prior to June, 1917, must continue to supply them free. In the case of school districts which did not make such a provision in 1917, the authority to provide free textbooks is discretionary.

Where the voters fail to approve a proposed tax to finance school operations, the Board may, nevertheless, levy a tax on the property owners living within the school district but only for such amounts as are necessary for "ordinary contingent expenses" of such school district.[2]

B. The Ultimate Facts

The Board of Education of Union Free School District No. 27, Town of Hempstead, following rejection of the 1970-71, 1971-72 school budgets by the voters of the district, furnished textbooks free to all children in grades seven through twelve as is required by New York Education Law § 701. Children in grades one through six, however, regardless of the economic status of their family, were required to pay a fee to obtain textbooks.[3]

Appellants are recipients of public assistance and the parents of a total of 6 children in public school grades 1-6. They were unable to pay the rental fees for textbooks, which ranged from $6.00 to $58.50 per household and their children, and all other children too poor to pay the rental fees, were denied textbooks which are recognized by the state to be essential to obtaining an adequate public education. Books were provided only to those children in grades 1-6 whose parents could afford the rental fees.[4] (A-38).

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[2]The Board concluded on the basis of Opinion Number 213 of the Counsel to the Education Department, dated July 6, 1967, that textbooks may not be provided free of charge to pupils in grades 1-6 when the voters have failed to approve a school district budget, inasmuch as textbooks are not considered to be "ordinary contingent expense" items within the meaning of § 2023 of the Education Law. (A-38).

[3]Because no budget was approved, the school board charged for various other services and supplies. Appellants were required to pay transportation costs for their children. In addition, charges were made for certain other supplies, e.g., workbooks, duplicating paper, materials, etc. (A-22).

[4]There is no dispute concerning appellants' inability to pay the fees. Prior to July, 1969, New York met educational expenses for AFDC children ages 6 through 11 in two ways. The sum of $1.00

C. The History of These Proceedings

On September 16, 1970, this class action was commenced in the United States District Court for the Eastern District of New York. Appellants sought both injunctive and declaratory relief. The constitutionality of the legislative scheme was subjected to a threefold challenge. The third cause of action claimed, in essence, that New York had denied indigent children textbooks essential for their required instruction solely because of their poverty, in violation of the Fourteenth Amendment (A-12). Appellants also alleged that textbooks can be obtained for children in grades 1-6 only upon payment of a fee [$7.50 per pupil]; that plaintiffs are indigent and cannot pay a fee; that by reason of plaintiffs' poverty their children are deprived of the equal protection of the law and deprived of equal educational opportunity; and that poor children denied textbooks receive an education inferior to those children learning with books, resulting in widespread feelings of inferiority and unfitness. (A-13)[5]

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each month was included in the basic needs grant. In addition, 18 NYCRR §352.5 (d) permitted special needs grants for such items as transportation, lunches, activity fees, gymnasium clothing, locker fees and textbooks, upon demonstration of a particular need. With the enactment of 131-a of the New York Social Services Law, [Laws 1969, c. 184] effective July 1, 1969, New York eliminated all special grants and substituted a system of flat grants to cover all items of basic sustenance, exclusive of rent and fuel which were added to the recipient's allowance on a separate basis. See *Rosado v. Wyman*, 397 U.S. 397 (1970). On remand, the Court in *Rosado v. Wyman*, 322 F. Supp. 1173 (E.D.N.Y. 1970) determined that approximately $3.00 is included in the monthly grant of a family of four for all educational expenses. Effective July 1, 1971, New York Social Services Law §131-a was amended [Laws 1971, c. 133] and New York enacted a ten percent reduction in the level of benefits. New York State now pays ninety percent of the standard of need of families with dependent children.

[5]The children, forced to attend classes without textbooks, were subjected to intolerable and harsh pressures, e.g., (a) being told that "he will receive an 'F' for each day he is without the required textbooks", (b) "when other pupils in class read from textbooks, the teacher doesn't let him share a book, instead she gives him paper and

The appellee, New York State Education Department, did not controvert any of appellants' allegations and filed no pleadings or affidavits in District Court.[6]

Appellee school district, in its answering papers filed in the District Court, actually supported the substantiality of the claim when it admitted:

> "That the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks." (A-35)

The District Court [Travia, J.] without holding an evidentiary hearing, denied appellants' application for the convening of a three judge court to hear the controversy, their application for preliminary injunctive relief, and dismissed the complaint. (A-58). The opinion failed to discuss appellants' claim that the challenged scheme denies indigent children the equal protection of the laws. (A-42-46).

The Court of Appeals for the Second Circuit by judgment entered August 13, 1971, affirmed. The majority conceded education to be an area of fundamental importance, and agreed that appellants had realistically described the deprivation visited upon poor children. (A-62).

The majority court held, however, that the legislative scheme did not invidiously discriminate against indigent children. Judge Moore, writing for the majority, reasoned:

> ". . . those who can afford textbooks will also no doubt receive a better education than those who

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tells him to 'draw'," (c) a six year old child being told by her teacher, "no money, no books." (A-28)

[6]The New York State Department of Education apparently conceded the factual allegations made by plaintiffs. On a motion to dismiss, the well-pleaded allegations of the complaint and affidavit must be taken as true. See, e.g., *Gardner v. Toilet Goods Association*, 387 U.S. 167, 172 (1967); *Cooper v. Pate*, 378 U.S. 546 (1964).

cannot but that is because they had the financial means to supplement that which the State provides and not because the State has provided them with more than has been provided plaintiffs." [ft. omit.] (A-73).

Judge Kaufman, dissenting, found that the State had handicapped indigent children by denying them textbooks provided to others who can afford them and that the fee requirements effectively bar indigent children from receiving an adequate education. (A-80).

SUMMARY OF ARGUMENT

The challenged legislative scheme for distributing textbooks to grades 1-6 of New York's public schools must be measured by the most exacting equal protection standard because the legislation burdens both a "fundamental" interest, education, and discriminates on the basis of economic status, a suspect and traditionally disfavored criteria. In order to justify the classification, the State bears the heavy burden of demonstrating a compelling interest which is served by the challenged legislation and cannot be satisfied by less burdensome means.

Education qualifies as a "fundamental" interest because of its long history of public esteem and its profound and measurable impact upon an individual's life chances for economic and social advancement. Education provides the very tools necessary to exercise those basic rights which are vital to the maintenance and preservation of our democratic society. The classic expression of the significance of education to the individual and society can be found in *Brown v. Board of Education*, 347 U.S. 483, where it was recognized as basic to the functioning of a free society. Textbooks are an indispensable part of public education and often serve as the entire curricula for children in the primary grades.

The State has denied equal protection of the laws by dividing public school children in grades 1-6 into two classes,

poor and non-poor, extending the full benefits of public education to those who can pay the textbook rental fees, but withholding the benefits of the State's educational program from those who cannot. The classification on the basis of wealth penalizes children, a discrete and insular minority, not because of any conduct of their own, but because of their status as members of poor families. Financial barriers which preclude indigents from exercising their fundamental rights were held violative of the Equal Protection Clause in cases involving the right to vote and cases involving the right to appeal from criminal convictions. The principle developed in *Griffin v. Illinois*, 351 U.S. 12 and its progeny applies to the equally important right to public education.

The State has also denied due process of law to poor children. The Fourteenth Amendment, in guaranteeing due process to all, protects a sphere of personal liberties so rooted in the tradition and conscience of our people that they rank as fundamental. The right to acquire knowledge has been held to be within the ambit of this sphere of protected personal liberties. *Meyer v. State of Nebraska*, 262 U.S. 390.

Education is assigned no lower a place on our society's hierarchy of fundamental values than is marriage or divorce. The public schools, like the courts, remain under the State's exclusive control. The rationale expressed in *Boddie v. Connecticut*, 401 U.S. 371, should be applied to fees which effectively bar indigent children from obtaining an adequate public education.

There can be no justification for this violation of fundamental constitutional principles. The various interests proffered by the State fail to justify the challenged classification. By denying textbooks only to poor children in grades 1-6, New York does not realize its goal of providing books to as many children as possible. Neither is the deprivation of books in the primary grades rationally related to the State's desire to foster the study of specific subjects in secondary

school. Additionally, there are several alternative and less restrictive means available to New York to achieve the governmental objective, means which do not burden fundamental rights.

The Court of Appeals erroneously affirmed the lower court's denial of the application for the convening of a three judge court to hear the controversy by employing an improper and unduly restrictive standard in conflict with the provisions of 28 U.S.C. §2281 and the guidelines established in *Ex Parte Poresky*, 290 U.S. 30. The Court, having acknowledged the existence of a legitimate controversy and the absence of direct precedent on the constitutional claim presented, should have refrained from assessing the ultimate merits of the claim and, instead, remanded the case to the District Court so that a three judge panel could be convened to hear the controversy.

POINT I

APPELLANTS' CHILDREN WERE DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT WHEN THEY WERE DENIED TEXTBOOKS ESSENTIAL TO THEIR PUBLIC SCHOOL EDUCATION SOLELY BECAUSE OF THEIR POVERTY.

A. The Statutory Scheme for the Distribution of Textbooks Divides Children into Two Classes and Denies Equal Public Education to Children in Grades 1-6 Solely on Account of their Poverty.

Appellants' basic contention is that the New York statutory scheme for distributing textbooks to public school children in grades 1-6 violates the Equal Protection Clause. The challenged scheme divides children attending public schools into two classes and, without any compelling state interest, burdens the fundamental right of poor children in grades 1-6 to equality of educational opportunity solely on account of their poverty by depriving them of textbooks

hich are both required and essential to their education. he classification frustrates the attainment of the central urpose of compulsory education in New York State, amely, the education of all children of the state.

In New York State, under the challenged statutory scheme, extbooks must be loaned free of charge to all pupils in ublic and private schools in grades 7-12. Textbooks ay be loaned free of charge to public school children grades 1-6 only where the voters of the district have pproved a tax for that purpose. In the absence of voter pproval the school board may levy a tax for ordinary con- ngent expenses but not for textbooks. (A-38). To obtain extbooks in the absence of voter approval, public school hildren in grades 1-6 must pay textbook rental fees. The ppellants, receiving public assistance from the Nassau ounty Department of Social Services, were unable to pay ie textbook rental fees which ranged from $6.00 to $58.50. heir children were compelled to suffer educational depri- ation by attending school without those textbooks which re required for their instruction and suffer emotional and sychological harm as a result of sitting side by side with ore affluent children learning with textbooks. The legis- tive scheme creates two classes of children, not physically eparate, yet unequal—the poor suffer while the rich receive ie full benefits of the State's educational program.

B. The Equal Protection Clause Requires that the Burdening of a Fundamental Interest Be Justified by a Standard of Compelling Interest.

In considering laws challenged under the Equal Protection lause, this Court has evolved more than one test, depending pon the interest affected and the classification involved.[7]

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[7]See, *Note Developments in the Law - Equal Protection*, 82. Harv. . Rev. 1065 (1969). Compare, e.g., *Shapiro v. Thompson*, 394 U.S. 18 (1969) and *Kramer v. Union* Free School District, 395 U.S. 621 1969), classification must be justified by compelling state interest with *IcGowan v. Maryland*, 366 U.S. 420 (1961) and *Williamson v. Lee* ptical of Oklahoma, Inc., 348 U.S. 483 (1950) classification must e rationally related to legitimate state interest.

In the present case whether we look to the interest affected [equal educational opportunity] or the basis for the classification [limited fiscal resources coupled with the State's desire to foster study in certain subjects], the challenged legislative scheme must be measured by the more exacting equal protection standard because the classification burdens the entitlement of poor children in grades 1-6 of the public schools to equal educational opportunity. Appellants' right to the most searching judicial protection is based upon the fundamental importance of education, that education is preservative of other basic civil and political rights; the politically impotent class subjected to the deprivation; and the discrimination by the State against children in the offering of public education based on their poverty.

1. Education is a Fundamental Interest and the *Sine Qua Non* of Useful Existence

"Americans regard the public school as a most vital civic institution for the preservation of a democratic system of government." *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963).

The creation and development of the tax supported public school system permits little doubt that Americans "have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." *Board of Education v. Allen*, 392 U.S. 236, 247 (1968).

The "free school system" is perhaps the most characteristic institution in America. The early architects of universal schooling viewed the concept of public education as the bulwark of the republic.[8] Education has historically

[8]The American concept of free public school education available to all children can be traced to the establishment of the North American colonies. The first compulsory education law was passed in the Massachusetts Bay Colony in 1642 and the first public school system was created in Massachusetts in 1647. See, Carlton, *Economic Influence Upon Educational Progress in the United States* (1908)

been viewed by the courts as "one of the purposes for which what is called the police power may be exercised" and has been recognized as "one of the first objects of public care." *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U.S. 79 (1907).

Early advocates of universal education advanced three arguments in support of free public schools.[9] First, and foremost, that it was necessary for the political safety and well-being of the State; second, that education promoted the elimination of such social evils as crime and pauperism; and third, that education promoted the economic well-being of the individual and prevented class differentiation. Education has long been regarded the prime factor in upward social and economic mobility. A major promise of our society, born of a literal belief in the equality of mankind, was the attempt to make education and schools the chief agent of social mobility, a means of self-improvement available to all.[10] The American people value education, not only as a reflection of itself, but as

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p. 9. The public school system in this country finally took root in the 1820's and 1830's, under the impetus of Jacksonian democracy. By 1820, New York, New England and most of the middle Atlantic states had a tax supported public school system, see, North, *Economic Growth of the United States*, 1790-1860 (1966) p. 174, By 1860 the majority of states established a public school system and more than half of the nation's children were receiving the *benefits* of education. See Wise Rich Schools, Poor Schools: *The Promise of Equal Educational Opportunity*, (1968) pp. 112-113.

[9]Governor Clinton, in his opening address to the New York Legislature, said in 1827: "The great bulwark of the republican form of government is the cultivation of education for the right of the suffrage cannot be exercised in a Salutory manner without intelligence." Carlton, *Economic Influences Upon Educational Progress in the United States* (1908) p. 51.

[10]Horace Mann, a commanding figure in the public school movement considered education beyond all other devices of human origin, as the great equalizer of the conditions of man - the balance-wheel of the social machinery. See Kirp, *The Poor, the Schools and Equal Education*, 38 Harv. Ed. Rev. 635 (1968).

a developer of society in all its cultural and social aspects. The pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable, as was recognized by this Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), when it stated:[11]

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Education is essential to democracy so much so that it has been characterized by one Court as "an aspect of twentieth century life so fundamental as to be fittingly considered the cornerstone of a vibrant and viable republican form of democracy. . ." *Hosier v. Evans*, 314 F. Supp. 316, 319 [D. Vir. Is. 1970]. The importance the State places upon education is attested to by the fact that in New York [N.Y. Education Law § 3205(1)], as in all but three states, education is made compulsory for a minimum of

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[11]The enactment by Congress of laws providing funding for education programs also attest to its significance. See, e.g., Elementary and Secondary Education Act of 1965, 20 U.S.C. §§234-244, 331-332, 821-827, 861-870, 881-885; Johnson-O'Malley Act, 25 U.S.C. §§452 454; National Defense Education Act of 1958, 20 U.S.C. §§401-602.

ten years.[12] While voting is of such importance that it is accorded special protective status as a right, education is considered of such fundamental importance to society that the State has rendered education a duty, imposed by reason of the State's police power, to prepare citizens for full participation in society.[13]

It is implicit in the history and character of American public education that the public schools, which are supported almost entirely in most communities by public funds, serve a uniquely public function: the training of American citizens so that they may assimilate a heritage common to all American groups. Attendance at public schools is not compulsory; parents remain constitutionally free to satisfy the compulsory education requirements by enrolling their children in private schools. See, *Meyer v. Nebraska*, 262 U.S. 390 (1923). To poverty stricken parents, the alternative between the public school system and private school system is illusory. The children of the poor are, in actuality, not only compelled to attend school for ten years, but must be dependent upon the public school system for their education.[14] The public school system, therefore, has enormous influence upon the personal develment and the minds of children.

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[12]The compulsory character of education is not unlike the compulsory character of criminal process. Although the individual's interest in freedom is unique from a larger perspective, education may have far greater social significance upon liberty than a free transcript or court appointed lawyer. Education, in addition, affects a vastly greater number of persons than the criminal law. Education also has an inverse relation on the rate of crime.

[13]See Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305 (1969).

[14]In this context, it has been suggested that "a child of the poor assigned willy-nilly to an inferior school takes on the complexion of prisoner, complete with a minimum sentence of twelve years." Coons, Clune and Sugarman, *supra*, 57 Cal. L. Rev. at 388.

entrusted to it.[15] The methods and curricula are not chosen by the parent but by the State:

> "[T]he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up." *Hobson v. Hansen*, 269 F. Supp. 401, 483 [D.D.C. 1967].

The importance of education was recognized by the Court below when it characterized it as "an area of fundamental importance." (A-72). Other courts, both federal and state, have also considered education as an area of fundamental importance.[16]

Textbooks are the heart of the public school system. In New York State, as in most other public school systems, textbooks are at the core of the curricula[17] and are essential, critical and an indispensable part of the teaching process. "Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit." *Board of Education v. Allen, supra*, 392 U.S. at 252 [Dissenting opinion, Jus-

[15]The classroom is peculiarly the "market place of ideas". *Keyishan v. Board of Regents*, 385 U.S. 589 (1967).

[16]In *Serrano v. Priest*, 96 Cal. R'ptr. 601; 487 P. 2d 1241, 1244 (1971) in a suit challenging the inequality of the local property tax scheme for financing public education, the Court, in declaring the law unconstitutional, stated that: "the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth. . . ." The *Serrano* rationale was followed by the New Jersey Superior Court in *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 2d 187 (1972). Several recent federal courts have struck down state methods of financing public education as unconstitutional, applying a more exacting standard because of the fundamental interest involved. See, e.g., *Van Dusartz v. Hatfield*, 334 F. Supp. 870 [D. Minn. 1971], and *Rodriguez v. San Antonio Independent School District* 337 F. Supp. 280 [W.D. Texas, 1971].

[17]New York Education Law § 701 (2) defines textbooks as a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

tice Black]. "No educational program can exist without books. . . A curriculum cannot survive without books."[18]

Judge Kaufman, dissenting in the Court below, stated: "Curricula not keyed to textbooks are advocated by some educators and have been put into practice in some private and public schools. But defendants do not dispute that New York's own public education system continues to rely extensively on the traditional method of teaching from texts. Children without the benefit of these texts, one must imagine and as affidavits before us aver, are afforded a markedly inferior education during their early years of schooling than are their non-indigent peers." (A-79).

Textbooks in the primary grades serve as the major structure for the entire curriculum. Children in the elementary school grades are learning to read, often they are unable to leave their textbooks and utilize outside resources and references found in libraries. In the first three grades, learning to read is perhaps the major occupation of the pupil. Beginning in about grade 4, reading becomes a tool for learning. Consequently, pupils who have not sufficiently mastered reading skills have ever-increasing difficulties with textbooks in different subject areas.[19] The early years of education are particularly critical to the learning process. Benjamin S. Bloom, Professor of Education at the University of Chicago, concluded that 30 percent of the development of general intelligence takes place between ages 4 and 8, and that 50 percent of vocabulary development at grade 12 [age 18] has been reached by the end of grade 3.[20]

[18]Affidavit of Dr. Gerald G. Glass, Professor of Education and Director of the Reading and Study Center and Graduate Program in Reading at Adelphi University, New York, September 24, 1970, presented by plaintiffs in the District Court. (A-31).

[19]James B. Conant, *Slums and Suburbs* [McGraw-Hill Book Compay, Inc. 1961], p. 57.

[20]Benjamin S. Bloom, *Stability and Change in Human Characteristics* [John Wiley and Sons, Inc. 1964] pp. 88-89, 127. Bloom's study concludes that there is plasticity in the intelligence of children and that marked change in the environment of early years can produce greater changes than equally marked changes in later years.

Children from the lower socio-economic class have demonstrated a greater need for reading skills. Within a few years, the child from the deprived background is retarded in basic reading skills. The reading retardation in early years prevents the pupil in later years from moving up into higher paying positions. Thus, reading disability tends to perpetuate the poor child's social class. Reading is the basic learning skill from which almost all academic learning is founded and is an indispensable requirement for upward movement through social classes.[21] Poor children deprived of textbooks in public schools are further handicapped by the lack of educational stimulus in the home. The handicap includes the lack of books and emphasis on reading in the home.[22] While the State has not controverted plaintiffs' contention that textbooks are a critical and an inseparable part of education, the local school board in the District Court admitted that, "textbooks . . . are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters." (A-40).

2. Education is Preservative of All Other Fundamental Basic Civil and Political Rights

Education is further recognized as important, not only in its own right, but because it is preservative of all other fundamental rights. Education provides the tools necessary to exercise every right considered vital to the maintenance of democratic institutions. While the right of suffrage is guaranteed by the Constitution, this Court has held that a

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[21] Benjamin Bloom, Allison Davis, Robert Hess - *Compensatory Education for Cultural Deprivation* [Holt, Rinehart & Winston, Inc. 1965].

[22] Patricia Cayo Sexton, *Education and Income* [The Viking Press, Inc. 1961]. The failure to develop reading skills locks the poor child into his socio-economic class and effectively ends the American Dream. The incidence of school dropout is three times higher among poor children; See, too, Michael Harrington, *The Other America*, pp. 182-183. (1966)

State may require literacy as a prerequisite to voting.[23] In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 52 (1959), this Court stated:

> "Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. [citation omitted]. It was said last century in Massachusetts that a literacy test was designed to insure an independent and intelligent exercise of the right of suffrage."

"[E]ducation underlies the whole substance of political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him."[24] Education is essential for the enjoyment of the following rights which this Court has already characterized as fundamental: voting [*Harper v. Virginia State Board of Elections*, 383 U.S. 663]; free speech [*Lovell v. City of Griffin*, 303 U.S. 444]; association [*NAACP v. Alabama*, 357 U.S. 449]; marriage [*Loving v. Virginia*, 388 U.S. 1]; travel [*Shapiro v. Thompson*, 394 U.S. 618]; divorce [*Boddie v. Connecticut*, 401 U.S. 371]; privacy [*Griswold v. Connecticut*, 381 U.S. 479].

Education bears directly on the ability of the individual to exercise all of the foregoing rights and the ability to participate meaningfully in the life of the community. As Judge Kaufman, dissenting, correctly observed:

> "The ideal of education in our society is to free men and women to pursue their own lives more fully. Economic and social mobility, cultural richness

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[23]In New York State eligibility to vote is dependent upon ability to read and write English. N.Y. Election Law §150.

[24]Coons, Clune and Sugarman, *supra*, 57 Cal. L.Rev. 305, 368.

and diversity, the inheritance of arts, skills, thoughts and values, the strong and flexible operation of democratic political processes, the growth and function of private institutions and associations, the habits, structures, virtues and idiosyncracies that make our society unique and coherent take root in formal and informal education." (A-77).

3. Those Subject to the Deprivation Created by the Statutory Scheme Comprise a Politically Impotent Class Requiring this Court's Special Protection

Legislation with respect to public education, like that dealing with welfare, deals with a critical aspect of the personal lives of citizens. Its importance is magnified by the defenseless and disadvantaged state of the class of citizen involved, poor children, who are less able than others to enforce their rights. As this Court has recognized:

> "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products*, 304 U.S. 144, 153, fn. 4 (1938).[25]

A class comprising children of parents too poor to pay textbook rental fees which range from $6.00 - $58.50 per household, comprising the poorest of the poor, public assistance recipients, clearly qualifies as such a discrete and insular minority.

> "More than any other segment of society, the very lowest economic stratum is socially isolated. The poor man not only fails to comprehend society or his community, he is out of touch with it. He reads fewer newspapers, hears fewer news programs, joins fewer organizations, and knows less of the

[25] In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Court cited aliens as a prime example of a discrete and insular minority for whom heightened judicial solicitude is appropriate.

> current life of either the community or the larger world than more prosperous, better educated people do." U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, *Low-Income Life Styles* (1968) pp. 4-5.

As Michael Harrington concluded in his classic study, *The Other America*, (1966) p. 13,[26] "The poor are politically invisible." Within the class of the poor the welfare poor are, if anything, even more isolated from the social and political life of the large community than are the poor as a whole:

> "[T]here are important differences between the very poor who manage to maintain themselves without public assistance and those who do not have the resources to achieve even a minimum level of economic independence. For example, negative public attitudes towards mothers who are dependent on AFDC tend to transfer to the mothers and their children, with an associated sense of failure, strong self-disparagement and hopelessness." U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, *Growing up Poor*, (1966) p. 7.

And the most powerless of the poor, lacking even theoretical access to the political process through the franchise, are the children whose education is here at issue:

> "[O]f all groups among the poor it is children who have been most neglected and most shabbily treated by current social policies, despite the fact

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[26] "[T]he poor and racial minorities . . . are not always assured a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary. *Hobson v. Hansen*, 269 F. Supp. 401, 507-08 (D.D.C. 1967), aff'd. sub nom, *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

that of all population groups they are the most vulnerable." Burns, Childhood Poverty and the Children's Allowance, in *Children's Allowances and the Economic Welfare of Children* [Burns, ed. 1968] p. 3.

4. The Statutory Scheme Creates Classification of Children Based on Conduct of Their Parents Over Which They Have No Control

The effect of the challenged scheme is to penalize children, not because of any conduct of their own, but because of their status as members of poor families. Classification embodying discrimination based on personal characteristics over which an individual has no control—such as race,[27] alienage,[28] indigence,[29] illegitimacy,[30]—have been regarded by this Court as inherently suspect and as calling forth "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

In the context of the statutory right to recover for the wrongful death of a parent, this Court has concluded that "it is invidious to discriminate against [illegitimate children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother." *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) [footnotes omitted]. The same rationale must apply to the statutory right to receive a public education. It is invidious to discriminate against certain innocent children "when no action, conduct or demeanor of theirs is possibly relevant" to their educational needs.

Because this Court is here concerned with a fundamental interest, high on our society's hierarchy of values, and the

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[27] e.g. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[28] e.g., *Oyama v. California*, 332 U.S. 633 (1948)

[29] e.g. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[30] e.g. *Levy v. Louisiana*, 391 U.S. 68 (1968).

children involved are being burdened for reasons of poverty over which they have no control, and inasmuch as children are politically the most impotent members of our society, the educational disadvantage and unequal education that the local school board admits result from the imposition of textbook rental fees must be subjected to the most searching judicial scrutiny possible. Such an inquiry, even in light of the proffered justification for the classification, must inevitably lead to the conclusion that appellants and the class they represent are being denied the equal protection of the laws.

C. The Equal Protection Clause Forbids Economic Discrimination in the Enjoyment of Fundamental Interests.

The Fourteenth Amendment to the United States Constitution requires the States to extend equal protection of the laws to all citizens. Tussman and tenBroek, discussing the Equal Protection Clause, wrote of the Fourteenth Amendment:

> "We now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights—especially, life, liberty and property—and to do so equally. We also know that the equal protection clause, the only clause of section one of the Fourteenth Amendment that added new language to the Constitution, was originally regarded as the most basic and sweeping of the three. . . ."[31]

The Equal Protection Clause has been applied to economic discrimination, and its effect has been to render the "mere state of being without funds. . .a neutral fact—constitutionally an irrelevance, like race, creed or color." *Edwards v. California*, 314 U.S. 160, 184-185 (1941) [Jackson, J. concurring]. Thus, income and ability to pay

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[31] *The Equal Protection of the Laws*, 37 Cal. L.Rev. 341 (1949).

appear to be joining race as a suspect criteria and when serving as the basis for discrimination, render government action vulnerable to attack on Fourteenth Amendment grounds. Financial barriers may not be imposed by the State to deny indigent citizens the equal protection of fundamental rights.[32]

The starting point for consideration of invidious discrimination against the poor, and the equal protection clause, is *Griffin v. Illinois*, 351 U.S. 12 (1956). The question before the Court was whether Illinois, consistent with the Due Process Clause, could deny adequate appellate review to the poor while granting the review to others. The State had conceded that transcripts were necessary for adequate appellate review of trial errors. The Court found the classification on the basis of poverty discriminatory and stated:

> "It is true that a State is not required by the Federal Constitution to provide . . . appellate review at all. [Citations omitted]. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." 351 U.S. at 18.

Poverty bears no relationship to the goals of criminal justice. The Court stated:

> "There can be no equal justice where the kind of a trial a man gets depends upon the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[33] 351 U.S. at 19.

[32] Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L.Rev. 435 (1967).

[33] The Court, having found that petitioners' constitutional rights were violated, refrained from dictating how the state might satisfy those rights and stated: "We do not hold, however, that Illinois must purchase a stenographer's transcripts in every case where a defendant cannot buy it . . . We are confident that the state will provide corrective rules to meet the problem which the case lays bare." 351 U.S. at 20.

The *Griffin* case was followed by a series of decisions which both reaffirmed and amplified its basic principles.[34]

In *Douglas v. California*, 372 U.S. 353 (1963) this Court considered the impact of poverty on the state guaranteed appellate review of a criminal conviction. Under the challenged California law, those who could afford counsel had received a full hearing automatically; those who could not afford counsel had been provided free counsel only if, after examination of the trial record, the appellate court concluded that counsel would be of particular value to the defendant. The Court found that the failure to provide counsel resulted in an impermissible classification between rich and poor, and stated:

> ". . . . [T]he rich man can require the Court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment." 372 U.S. at 357-358.

There is a striking parallel between the pivotal facts in *Griffin* and the case before the Court. In both cases, the challenged statute offers all persons the right to receive some benefit—right to appeal or the right to an education. In both cases, the enjoyment of the benefit is conditioned upon the payment of a fee. In *Griffin*, the State conceded that trial transcripts were necessary for adequate appellate review. Here, the State has not controverted appellants' allegations that textbooks are indispensable to the education of their children and the local school board has, in fact, admitted that "textbooks are essential to a quality educational program and a necessary and fundamentally basic tool in the education of youngsters." (A-40).

[34]See, e.g. *Eskridge v. Washington State Board of Prison T. & P.*, 357 U.S. 214 (1958), [*Griffin* applied retroactively]; *Burns v. Ohio*, 360 U.S. 252 (1959) filing fees for appeal; *Smith v. Bennett*, 365 U.S. 708 (1961) filing fees for habeas corpus; *Lane v. Brown*, 372 U.S. 477 (1963) free transcript required in coram nobis proceeding; *Long v. District Court of Iowa*, 385 U.S. 192 (1966), free transcript required for habeas corpus.

In *Griffin*, all convicted defendants had a right to appeal, but the inability of indigent defendants to pay a fee deprived them of the opportunity for adequate appellate review. In New York all children in grades 1-6 have the right to an education, but those too poor to pay the textbook rental fees which are a prerequisite to the distribution of textbooks, are, in the words of the local school board:

> "[U]nder an educational disadvantage and denie(d) . . . an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks." (A-41).

The Court's observation in *Griffin* that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," *supra*, 351 U.S. at 17, applies with equal force to the fundamentally important institution of public education. In both cases, indigents are denied access to their rights solely because of their inability to pay the fees. Just as no rational relationship existed in *Griffin* between the ability to pay a fee and the guilt or innocence of the defendant, here too, no rational relationship exists between a child's need for a public school education and the affluence of his parents.

The Court focused on the impact of fees upon ability of the poor to exercise fundamental rights in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966). The Court, in declaring a $1.50 poll tax imposed by the State as a prerequisite to voting unconstitutional, stated:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . [W]ealth or fee paying has, in our view, no relation to voting qual-

> ifications; the right to vote is too precious, too fundamental to be burdened or conditioned."[35]

In ruling the economic discrimination of the poll tax violative of the Equal Protection Clause, this Court focused on the impact of the legislation on the right of the poor to exercise their franchise. The Court recognized voting as preservative of other basic civil and political rights. 383 U.S. at 667. The Court found that the economic discrimination kept poor people with an important stake in the political process from the ballot. Here the rental fee keeps poor children with an important stake in the system of public education from receiving a quality education provided to their more affluent classmates. Education is no less preservative of basic civil and political rights than is the ballot. Education and literacy often are the precondition to the exercise of the ballot. See, *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959).

The foregoing cases cannot be distinguished on the basis that they relate only to basic federal constitutional rights as was argued by the State in the Court below. In *Harper*, the Court did not decide whether the right to vote in a state election is conferred by the federal constitution; instead, the holding rests upon the principle:

> "... once the franchise is granted to the electorate lines may not be drawn which are inconsistent with the Equal Protection Amendment." 383 U.S. at 665.

Neither *Griffin* nor *Douglas* involve a basic federal constitutional right; in each case the state has conferred a right to appellate review. The holdings stand for the principle that once a state has granted a right or benefit the Equal Pro-

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[35] In *McDonald v. Board of Elections Comm.* 394 U.S. 802 (1969), while the Court rejected a constitutional challenge to the absentee voting statute brought by inmates of a county jail, it reaffirmed the principle of Harper and stated: "[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race." 394 U.S. at 807.

tection Clause protects defendants from invidious discrimination on account of their poverty.

As Judge Kaufman, in the Court below, observed, "It will not do to say, as does the majority, that in this case 'public funds are distributed equally'." (A-81). In *Griffin*, *Douglas*, and *Harper*, the statute found constitutionally impermissible did not expressly discriminate against indigents as a class. Instead, in each case payment of a fee was the prerequisite to securing a transcript, a lawyer and a ballot. The Court in each case held the impact of the requirement was no different than if the poor had been expressly excluded.

Here, the statutory scheme for providing textbooks, although non-discriminatory on its face, is grossly discriminatory in its operation. In *Williams v. Illinois*, 399 U.S. 235 (1970), the Court held that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine.[36] The Court considered, and rejected, the State's argument that the law was non-discriminatory on its face, found that the statute worked an invidious discrimination, and stated:

> "On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who by definition, is without funds." 399 U.S. at 242.

Here, as in *Williams*, the statute although non-discriminatory on its face, is in operation discriminatory. While the statute extends to all children an apparently equal opportunity to obtain textbooks by payment of rental fees, such

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[36] In *Tate v. Short*, 401 U.S. 395, (1971), the Court held it was a denial of equal protection to limit punishment of a crime to those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it.

choice is an illusory one for indigent children who are without funds.

Recently, in *Mayer v. Chicago*, 404 U.S. 189 (1971) this Court declined to re-examine *Griffin* and upheld the right of indigents to trial transcript in non-felony cases where punishment was fine rather than confinement. Contentions of the City that *Griffin* and its progeny are confined to cases where the indigent is subject to confinement, and that the interest of the indigent was outweighed by the State's fiscal and other interests in not burdening its appellate process, was expressly rejected by the Court:

> "*Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."

The opportunity of education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education, supra,* 347 U.S. at 493. New York State, by discriminating against poor children in grades 1-6 solely on account of their poverty, has breached that guarantee of "equal educational opportunity without the vestige of invidious discrimination."

D. The Proffered State Interests Fail to Justify the Denials of Equal Educational Opportunity.

To fulfill the constitutional command that "no state . . . shall deny to any person within its jurisdiction the equal protection of the laws," a state-imposed classification, at the very *minimum*, must be rationally related to the attainment of a legitimate governmental objective. *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897). However, laws which are based upon suspect criteria such as race or wealth, or burden the exercise or enjoyment of a fundamental right or interest, are unconstitutional unless

the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest."[37] *Shapiro v. Thompson, supra*, 394 U.S. at 634. [Emphasis added]; *Kramer v. Union Free School District, supra*, 395 U.S. at 627. As this Court recognized in *Dunn v. Blumstein*, 92 S. Ct. 995, 1003 (1972):

> "[L]egal 'tests' do not have the precision of mathematical formulas. The key words [necessary to promote a compelling governmental interest] emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes."

The District Court dismissed the complaint without benefit of an evidentiary hearing, or answer and affidavits by the State and concluded that the legislature had three objectives in enacting the statutory scheme: (a) a legitimate interest in conserving fiscal resources; (b) a legitimate interest in providing textbooks to as many children as possible, and (c) a desire to foster study in certain subjects. (A-54-55). The District Court opinion conspicuously avoids any discussion of what Judge Kaufman, in his dissenting opinion in the Court below, characterized as the essence of plaintiffs' case, "discrimination between poor children in elementary schools without textbooks and their more affluent classmates who can afford texts." (A-74). The majority in the Court below approved the District Court's application of the compelling interest standard and concluded that "the legislative scheme is reasonable; it is buttressed by compelling state justifications and is not tainted with the slightest hint of invidious discrimination." (A-67).

It is not sufficient to merely show that the statute which burdens a fundamental interest furthers a substantial state interest, for a state may not choose means which unnecessarily burden a fundamental right. Statutes affecting funda-

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[37]See, Note, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

mental interests must be drawn with "precision", *NAACP v. Button*, 371 U.S. 419, 438 (1963), and must be "tailored" to serve their legitimate objectives. *Shapiro v. Thompson, supra*, 394 U.S. at 631. The State has failed to show that this classification which burdens the right of poor children is more than just one of several reasonable ways of achieving its goals.

"[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn v. Blumstein, supra*, 92 S. Ct. at 1003. Thus, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that burden fundamental interests when the end can be achieved through less onerous alternatives.[38] The review for less restrictive alternatives to achieve a valid governmental objective must be a searching one. *Shapiro v. Thompson, supra*, 394 U.S. at 633-8; *Kramer v. Union Free School District, supra*, 395 U.S. at 632.

In *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), this Court said:

> "The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose."

Appellants will now turn to consideration seriatim of the State's justification for denying textbooks to indigent children in grades 1-6.

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[38] The principle of the least onerous alternative has been applied to public education. See, e.g., *Blocker v. Board of Education*, 226 F. Supp. 208, 223, 229 [E.D.N.Y. 1964].

1. *The desire to provide textbooks to as many children as possible.*

If, indeed, the statutory scheme is intended to enable as many children as possible to have textbooks, the District Court erroneously failed to consider other less onerous alternatives for achieving this legitimate goal.[39] Without additional expenditures, New York State could avoid the invidious discrimination by providing free textbooks in grades 1-12 to *only* those children in financial need. By providing free textbooks to only those children who are unable to pay the textbook rental fees, the articulated State goal of assuring that as many children as possible have textbooks will be realized, while preserving the limited resources available.

Another less restrictive alternative which the District Court failed to consider, and which was pointed out by plaintiffs in the Court of Appeals, was that the New York Education Law § 2023 could be amended to include textbooks for children in grades 1-6 in the definition of "ordinary and contingent expenses" so that a local school district could nevertheless levy a tax for textbooks even in the absence of voter approval.

Appellants contend that a close scrutiny of the proffered reasons for the classification fail to satisfy either the "traditional" equal protection standard or the "more stringent standard" applied where fundamental interests, such as education, are burdened.

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[39]The District Court, in a less than searching analysis of alternatives, concluded that there were only four choices available to the Legislature, 1) make no contribution for purchase of textbooks for any children, 2) contribute to purchase of textbooks to be loaned free to all children in grades 1-12, 3) contribute to purchase of textbooks to be loaned free to all children in grades 1-12, but limit amount to be spent, 4) contribute to the purchase of textbooks to be loaned free to some children and amend §703 to provide for the others. (A-54).

2. *The Denial of Textbooks to Indigent Children in Grades 1-6 Conserves Fiscal Resources.*

This Court has recognized that in cases where a fundamental interest is burdened by the challenged classification, it is not sufficient to merely ask whether the policy adopted is "rational", for it is always rational to practice public parsimony. Attempts by states to justify the conditioning of fundamental rights or the enjoyment of fundamental interests on the basis of their need to conserve resources has been rejected by this Court. In *Shapiro v. Thompson, supra,* 394 U.S. at 633, this Court in dictum, stated:

> "[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. . . . The saving of . . . costs cannot justify an otherwise invidious discrimination:"

This Court rejected the fiscal resource argument proffered by Arizona in a recent equal protection case involving a denial of welfare benefits to aliens. See, *Graham v. Richardson, supra,* 403 U.S. at 374.

In *Bullock v. Carter*, 92 S. Ct. 849, 858-859 (1972), the Court rejected the State's argument that filing fees in primary elections were fiscally necessary:

> "Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogative of voters."

The State may not, because of its desire to conserve fiscal resources, or some more remote administrative benefit, burden a citizen's fundamental interests. *Carrington v. Rash*, 380 U.S. 89, 96 (1965). So too, the State may not deprive

indigent children of the tools essential for their education by consideration of minimum financial expediency.

The District Court, in upholding the limited fiscal resources justification, stated:

> "The Legislature may justify its failure to [provide textbooks free of charge to all children in grades 1-12] on the basis of its legitimate interest in conserving the State's fiscal resources, providing that choice does not result in any invidious discrimination.... [S]ince this Court cannot compel the State to expend any funds, much less additional funds for textbooks, this Court cannot fault the Legislature's failure to choose the second alternative." (A-54)

The District Court improperly proscribed its analysis by excluding any alternative to the invidious classification which required the expenditure of funds. In *Griffin* and its progeny, however, this Court required the states to provide services wrongfully denied citizens solely because of their poverty. Implementation of these decisions necessarily required increased expenditures. "[N]ew cases expose old infirmities which apathy or absence of challenge have permitted to stand. But the Constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of status quo." *Williams v. Illinois, supra*, 399 U.S. at 245.

Maximizing the impact of limited funds so that as many children as possible receive textbooks in New York State is a formidable sounding state interest. Such interest is a legitimate and compelling government goal. However, it is impossible to see how the challenged scheme for distributing textbooks is necessary to fulfill the pertinent State objective. The desire to provide books to as many children as possible hardly justifies denying textbooks to indigent children in grades 1-6 while making them available to non-poor children in the same grades, and by providing textbooks to all children in grades 7-12 irrespective of their financial need. To make textbooks available to as many children as possible, New York State simply has to pro-

vide free textbooks to those children who are unable to pay the required fees. Objective criteria to establish need can easily be formulated and implemented without imposing an excessive administrative burden.

3. *The Denial of Textbooks to Indigent Children in Grades 1-6 Fosters the Study of Certain Subjects in Grades 7-12.*

"In construing legislation, it is fundamental that [the Court] must not be guided by a single sentence or member of a sentence but [should] look to the whole law, and its objects or policy." *Richards v. United States*, 369 U.S. 1, 11 (1961). Both Courts below upheld the denial of textbooks to indigent children in grades 1-6 by finding the compelling "interest standard" satisfied by reason of the Legislature's policy statement that textbooks were provided free of charge to pupils in grades 7-12 to increase the proficiency of students in science, mathematics and foreign languages. (A-69).

A careful reading of the policy statement which accompanied the passage of § 701 by the New York Legislature does not support the interpretation given to it by the lower courts. The Legislature, in its "statement of policy" to the Act [Laws of 1965, c. 320 § 1] speaks of aiding "non-sectarian subjects" and gives as examples, "science, mathematics (and) foreign languages." The policy statement was clearly intended to limit public aid to parochial schools to non-sectarian textbooks and thereby avoid a conflict with the First Amendment.[40] The desire of the Legislature as reflected in its policy statement "for more adequate educational opportunities and increased efforts to educate more of the talent of our nation . . ." bears no rational relationship to the denial of textbooks to poor children in grades 1-6.

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[40]See, dissenting opinion of Justice Douglas in *Board of Education v. Allen*, supra, 392 U.S. at 255-256, for a full discussion of the legislative policy statement.

The State has not controverted plaintiffs' proof that textbooks are more critical to education in grades 1-6 than 7-12. The evidence presented to the District Court establishes that textbooks provide the entire curriculum for children in grades 1-6 who are still "learning to read" and have not developed the ability of "reading to learn" which high school students are capable of doing. Students deprived of textbooks in grades 1-6 will not have the basic skills necessary to become proficient in elementary school, much less in high school.[41]

There is no rational relationship between the State's objective of fostering the study of certain subjects in secondary school and maximizing the impact of contributions for textbooks, with the burdening of the right of indigent elementary school children to acquire knowledge. In *Meyer v. State of Nebraska*, 262 U.S. 390, 403, the Court, in *dicta*, observed: "It is well known that proficiency in a foreign language seldom comes to one not instructed in a foreign language at an early age. . . ." Children deprived of textbooks in the years of greatest development of intelligence will seldom become proficient in studies in their secondary grades.

The importance of textbooks to children in their formative years of schooling cannot be overemphasized, for the deprivation of textbooks in elementary grades will permanently retard reading skills; without these basic skills, enriched curriculum on a secondary level will be of dubious value. Textbooks distributed to children at grade 7 who have been deprived of these basic tools in elementary school and the needed foundation to learning is useless, for they have already been programmed by the state for failure throughout their school career.[42] The challenged statute

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[41] See, Affidavit of Dr. Gerald G. Glass, Professor of Education at Adelphi University, Garden City, New York, filed in the District Court. (A-31).

[42] Benjamin S. Bloom, *Stability and Change in Human Characteristics* [John Wiley and Sons, Inc. 1964] p. 127.

does not accomplish the articulated State purpose with sufficient precision. *Kramer v. Union Free School District, supra*, 395 U.S. at 632. The classification is destructive of the State goal of providing "more adequate educational opportunity" and the denial of textbooks to indigent children does not further the State's constitutional mandate to provide for the maintenance and support of a system of free common schools "wherein all the children of [the] State may be educated." New York State Constitution, Article XI, §1.

POINT II

INDIGENT CHILDREN DENIED TEXTBOOKS BY THE STATUTORY SCHEME ARE DEPRIVED OF THEIR RIGHT TO ACQUIRE KNOWLEDGE WITHOUT DUE PROCESS OF LAW.

The Due Process Clause of the Fourteenth Amendment protects all citizens, students included, against the State and all its creatures–boards of education not excepted. *Barnette v. West Virginia Board of Education*, 319 U.S. 624, 637 (1943); *Tinker v. DesMoines Independent Community School District*, 393 U.S. 503, 511 (1969).

This Court has written that the Fourteenth Amendment establishes a sphere of personal liberty for every individual and protects those personal liberties so rooted in the tradition and conscience of our people that they rank as fundamental. *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934). The sphere of fundamental rights protected by the "liberty" assurance includes, but is not restricted to, the specific terms of the Bill of Rights.[43] Freedom of speech and of the press are prime examples of those personal rights and liberties protected by the Due Process Clause.

[43]See, e.g., *Griswold v. State of Connecticut*, 381 U.S. 479, 484 (1965), where the Court held the right of marital privacy to be within the protective penumbra of the specific guarantees of the Bill of Rights and therefore protected by the Due Process Clause.

The language and history of the Ninth Amendment supports this Court's conclusion in *Griswold v. Connecticut*, *supra*, 381 U.S. at 488, that there are additional fundamental rights which exist alongside those expressly mentioned in the first eight constitutional amendments.[44] See, *Redlich, "Are there 'Certain Rights . . . Retained by the People'?"*, 37 N.Y.U.L. Rev. 787, 804-812 (1962).

Due Process has never been defined with any precision, but through the decisions of this Court "it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual has struck between that liberty and the demands of organized society." The liberty guaranteed by the Due Process Clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 542, 543 (1961) (dissenting opinion, Harlan, J.); see, *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942).

Education is valued as a major determinant of an individual's chances for economic and social success in our society. The respect which the American people hold for education is deeprooted and the acquisition of knowledge has long been regarded as a matter of fundamental importance.[45] The significance of education was perhaps best expressed in *Brown v. Board of Education*, *supra*, 347 U.S. at 493, which stated, "In these days it is doubtful if any child

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[44] In *Kent v. Dulles*, 357 U.S. 116, 125 (1958), and *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1969), the right to travel was held to be a fundamental right protected by the "liberty" assurance of the Due Process Clause.

[45] In the Northwest Ordinance of 1787, Congress declared: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

may reasonably be expected to succeed in life if he is denied the opportunity of an education." Public education supports each and every other value of our society.

In *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), the Court struck down a law which compelled attendance of all children in public schools, holding that it conflicted with the "liberty of parents and guardians to direct the upbringing and education of children under their control."

In *Meyer v. State of Nebraska*, 262 U.S. 390 (1923), the Court held that a law which prohibited the teaching of a foreign language to children in elementary schools deprived the children of their right to acquire knowledge without due process; the Court, holding that the State may not, consistent with the Fourteenth Amendment, contract the spectrum of available knowledge, stated:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed . . . without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399.

While recognizing the interest of the State in improving the quality of its citizens, the Court concluded that it may not do so by burdening the pupil's basic right to the acquisition of knowledge.

In this case, just as in *Meyer*, the State has burdened the right of indigent children to acquire knowledge without any rational, much less compelling, governmental objective. The deprivation in *Meyer* involved the right to acquire knowledge in a single subject, whereas in this case, indigent children in grades 1-6 who are denied textbooks are in actuality deprived of the curriculum for every subject.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that indigents barred from obtaining divorces

because they were unable to pay court costs and fees averaging $60 were deprived of due process of law. The Court considered the interests affected–the basic position of the marriage relationship in our society's hierarchy of values and the State's exclusive control of the machinery for the dissolution of the marriage relationship, and concluded:

> "[A] State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve the legal relationship without affording all citizens access to the means it has prescribed for doing so."[46] 401 U.S. at 383.

The *Boddie* decision is grounded upon the importance of the marriage relationship on the nation's traditional scale of values and the State's monopolization of the means for legally dissolving that relationship. The *Boddie* rationale is applicable to this case. Here the interest of indigent children to acquire knowledge and obtain an adequate public education is nó less important to our society than is dissolution of marriage relationships. In *Boddie*, the State was in exclusive control of the machinery to dissolve the relationship. The same can be said for public education. New York State has arrogated to itself responsibility for administering and enforcing a formal system of education. It does so by compelling attendance of all children between the ages of 6-16 for required instruction. It must be assumed that New York considers textbooks to be of positive value to the education of children in grades 1-6 since their use is required by state law.[47] The local school board has admitted that "textbooks . . . are essential to a quality educational program and a necessary and basic tool in the education of youngsters." New York is in the anomalous position of withholding only from poor children what it acknow-

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[46] In separate concurring opinions, Justices Douglas and Brennan concluded that the case should have been decided on the basis of the Equal Protection Clause and the line of cases marked by *Griffin v. Illinois*, 351 U.S. 12 (1956).

[47] See, § 701(2) of the New York Education Law.

ledges to be essential for the education of all children. Education for only the wealthy is an elitest concept alien to our democratic heritage and contrary to the tradition of public education.

A statute may be constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of a police power is beyond question. *Boddie v. Connecticut, supra,* 401 U.S. at 379. The *Boddie* Court, on the basis of the *Griffin* rationale, considered and rejected the State's argument that the costs and fees were justified as a mechanism of resource allocation or cost recoupment. The fiscal resources argument is not sufficient to override the right of the indigents to full access to interests of fundamental importance.

In *Brown v. Board of Education, supra*, 347 U.S. at 494, the Court found that the denial of equal educational opportunity on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The majority in the Court below recognized that the challenged legislative scheme "engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally and educationally disastrous to their wellbeing." (A-62). Requirements of due process prohibit state stigmatization and imposition of badges of disgrace upon innocent children. *C.f. Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

In *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) the Court, in holding that segregation in the public schools deprived Negro children of due process of law, considered the psychological burden and feeling of inferiority generated by segregated education and concluded that the restriction on the liberty of children [to equality education] was not reasonably related to any valid governmental objective. The Court stated:

> "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

In sum, the legislative scheme creates two classes of children, not physically separate as in *Brown* and *Bolling*, but certainly unequal. New York, on the basis of wealth–which like race is a traditionally suspect criteria–has discriminated against the right of appellants' children to acquire knowledge and receive public education equal to those of their classmates wealthy enough to obtain textbooks from the State. Here the rich receive the full benefits of a public school education, while the poor are denied equality of educational opportunity. New York has failed to justify this psychological stigmatization and educational handicapping of indigent school children.[48]

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[48]In *James v. Valtierra*, 402 U.S. 137, 145 (1971), Justice Marshal, in a dissenting opinion joined by Justices Brennan and Blackmun, wrote: "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."

POINT III

THE COURT BELOW ERRONEOUSLY FOUND THE CONSTITUTIONAL QUESTION INSUBSTANTIAL BY APPLYING AN UNDULY RESTRICTIVE STANDARD IN CONFLICT WITH THE GUIDELINES ESTABLISHED BY THIS COURT.

The Court below affirmed the District Court's denial of appellants' application for the convening of a three judge court pursuant to the requirements of 28 U.S.C. §2281.[49]

The District Court's decision cited no precedent for its refusal to convene a three judge court to hear appellants' claim. One surmises that the Court evaluated appellants' claim on the merits and, finding it insufficient as a matter of law, used this finding as a basis for its decision on the three judge court.[50]

The precise guidelines to be followed by a district court in deciding a motion to convene a three judge court have

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[49] §2281 provides:

> "Injunction against enforcement of State statutes; three judge court required:
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this Title."

[50] Judge Travia's opinion does not make it clear as to whether he found plaintiffs' claim to be "wholly insubstantial" or merely lacking in sufficient merit to ultimately prevail. The distinction is not unimportant. If the single judge employed the latter standard, as it appears that Judge Travia did from his lengthy consideration of many balancing and counterbalancing factors, then he is, in fact, performing and usurping the function of the three-judge court to decide after a full hearing upon the merits of the cause presented.

been clearly delineated by this Court in *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962), when it stated:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

In weighing these questions, the district court judge must convene a three judge panel unless the constitutional claim against statewide regulations is "obviously without merit," *Ex Parte Poresky,* 290 U.S. 30, 31-32 (1933), or "because its unsoundness so clearly results from the previous decision of this Court as to foreclose the subject." *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255, (1938); see *Schneider v. Rusk,* 377 U.S. 163 (1964).

A. The Court below applied a standard in conflict with an unbroken line of decisions of this Court.

In its analysis of appellants' constitutional claim, the Court below recognized that appellants had realistically described the plight of their children when they stated:

> "Indigent children sitting bookless, side by side in the same classroom with other more wealthy children learning with purchase[d] textbooks engenders a widespread feeling of inferiority and unfitness in poor children and is psychologically, emotionally, and educationally disastrous to their well-being." (A-62).

The majority, in assessing this deprivation, seemingly acknowledged the substantiality of petitioners' claim that the challenged statutory scheme effectively denied equal protec-

tion of the laws to indigent children unable to obtain required textbooks because they lacked the prerequisite fees. It appeared to be troubled by its burden of determining "what is substantial" and concluded that in the final analysis only this Court could make that determination. Faced with an equal protection challenge in the area of education and presented with constitutional questions which have not been foreclosed by earlier decisions of the Supreme Court, the Court of Appeals proceeded to obscure the clear guidelines established by this Court in *Idlewild, Poresky* and *California Water Service Co.*, and adopted a new and unduly restrictive standard: whether the constitutional claim "might" be foreclosed by earlier decisions of this Court.

The standard of review actually used by the Court below was an assessment of the case upon the merits, requiring a three judge court to determine the controversy only if the statute was likely to be held unconstitutional, i.e., no existing precedent which "might" foreclose the subject. No authority by this Court exists for this narrow interpretation of 28 U.S.C. §2281. What precedent there is requires that the claim's unsoundness be clear and beyond doubt if a three judge court is to be denied. Otherwise, the statutory panel must be convened. Under the erroneous standard applied, and contrary to the express rulings of the Court, the possibility of ultimate defeat on the merits was found to be sufficient reason to deny the convening of the three judge court, rather than the certainty of being foreclosed.

The reasoning of the majority in using the restrictive standard of "possibility of loss" was twofold. First, it was said that fewer judges and fewer "indiscriminate three judge appeals" would be involved, a projection accurately labeled by Judge Kaufman in his dissenting opinion as amounting "at best to a self-fulfilling prophesy."[51] (A-75). See *Har-*

[51] Judge Kaufman, in his dissenting opinion (A-75) correctly observed that the convening of the three judge court in the first instance, because it bypasses the normal appellate level, will involve fewer judges in the ultimate disposition of the case, as has been amply demonstrated by the procedural history of this case.

grave v. McKinney, 413 F. 2d 320 (5th Cir. 1969).[52] Secondly, the majority contended that any harm to petitioners in an erroneous denial of the direct Supreme Court Appeal from a three judge court can be remedied by certiorari review, as herein sought. See *Miller v. New York Stock Exchange*, 425 F. 2d 1074 (2nd Cir. 1970), *cert. den.* 398 U.S. 905 (1970). But, of course, if the claim is in fact "substantial", then certiorari is an extremely lengthy process by which to determine the constitutional question, far lengthier than the convening of the three judge court in the first instance. The Court below, having acknowledged that "those who can afford textbooks will also no doubt receive a better education than those who cannot" (A-73) should have remanded immediately without attempting to assess the ultimate outcome of the case. Judge Kaufman, dissenting, properly concluded that the "substantial claim" test may well produce the "most efficient operation of the three judge court scheme as presently constituted," and that in any event, "judges should not in their frustration yield to the temptation to legislate their own solutions .... especially, as here, when the judicial statutory amendment is as likely to increase burdens and delays as to alleviate pressures." (A-76).

The standard applied by the Court below is in conflict with that applied by the Fifth, Sixth and Seventh circuits.[53] In

[52] The *Hargrave* case clearly demonstrates the waste of judicial time which results from the refusal of a district court to convene a three judge court in the first instance. In Hargrave, the Fifth Circuit reversed the lower court and ruled that a three judge court must be convened to consider the constitutionality of a Florida public school financing statute under an equal protection challenge. On remand, a three judge court held the statute unconstitutional. *Hargrave v. Kirk*, 313 F. Supp. 944. (1970) On appeal, this Court vacated the district court decision on other grounds, but indicated on remand that the lower court should thoroughly explore the equal protection issue. *Askew v. Hargrave*, 401 U.S. 476 (1971).

[53] See, too, *Rodriguez v. Brown*, 437 F.2d 34 (5th Cir. 1971); *Protestants and Other Americans United for Separation of Church and State v. United States*, 435 F. 2d 627 (6th Cir. 1970); *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969); *Williams v. Page*, 309 F. Supp. 814, rev'd. No. 18536 (7th Cir. 1971) [unreported] cert. den. 404 U.S. 1005 (1971).

Jackson v. Choate, 404 F. 2d 910, 913 (5th Cir. 1968), the Court held that a three judge court must be convened to pass on the merits of the claim unless it is an "open and shut case." The Court stated:

> "In this day and time of dynamic expansion of constitutional principles and their application to new and sometimes unheard of situations it takes judicial prescience of a Delphic order to say with certainty that the attack is insubstantial. It is the better course —certainly from an administrative standpoint—to forego the doubts, constitute a 3-Judge Court, and allow that court to determine initially this and the other issues."

Furthermore, the standard applied by the Court below is in conflict with the Second Circuit opinion in *McMillan v. Board of Education,*[54] 430 F.2d 1145, (2d Cir. 1970), a case also involving a Fourteenth Amendment challenge to the distribution of educational benefits. The Court recognized that the constitutional question in this area of law remains unresolved and stated:

> "In stating these questions, we are not suggesting that they will necessarily be resolved in plaintiffs' favor. The state may well be able to develop sufficient reasons to justify what it has done. We hold merely that the claims were sufficiently substantial to deserve exploration, possibly after the taking of evidence, before a court of three judges. This is a developing area of application of the equal protection clause [ft. omit] and questions should not be deemed unsubstantial merely because they might have been so considered twenty years ago when the right-privilege distinction was more highly regarded than it is today." *Id.* at 1150.

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[54] *McMillan* held that a three judge court was required to consider plaintiffs' claim that they were denied the equal protection of the law because their poverty would not permit them to take advantage of the state's offer to pay $2,000 for the tuition at special private schools for handicapped children [which was only available if they could pay the difference between the stipend and full tuition].

This Court has clearly defined substantiality for the purpose of convening a three judge court in *Ex Parte Poresky, supra,* 290 U.S. 30, 32 (1933):

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint. [cit. omit] The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' "

The narrow question for determination in the courts below was whether plaintiffs' claim is "obviously without merit." 290 U.S. at 32.

The lower courts lengthy and intricate balancing of legislative factors [many of which were not substantiated by evidence in the record] is, in fact, more than a recognition of a legitimate controversy raised by appellants. It constitutes a clear admission that a substantial claim had been raised which then required the court's positing of countervailing factors. Having acknowledged the existence of the legitimate controversy, the lower court's proper role was to immediately convene a three judge court, irrespective of the court's own lingering doubts as to the ultimate outcome of the case on the merits. See *Hargrave v. McKinney,* 413 F.2d 320, 324, 328 (5th Cir. 1969).

The majority's conclusion that the claim presented in this case is not substantial is inconsistent with its admission that education is an area of fundamental importance and its recognition that binding precedent requires states to demonstrate the existence of a compelling state interest in order to justify conditioning the exercise of fundamental rights or the enjoyment of fundamental privileges upon the payment of money. The holding is properly questionable in light of the admissions by the local school board that:

"textbooks for all pupils are essential to a quality educational program and a fundamental tool in the education of youngsters." (A-40)

and

"That the denial of free textbooks places some children under an educational disadvantage and denies to them an educational opportunity equal to the children of those families that can afford to pay a rental charge for textbooks." (A-41)

B. The Court Below Erroneously Applied this Court's Ruling in Dandridge v. Williams, 397 U.S. 471, in Rejecting Appellants' Equal Protection Claim.

As was recognized by the Court in *McMillan v. Board of Education, supra*, 430 F.2d at 1150 (2d Cir. 1970), the application of the equal protection clause to the area of education is a "developing area" of law. This is evidenced by recent litigation which challenged the validity of conditioning public education upon the payment of fees.[55]

The Court below erroneously concluded that the constitutional claim had been rendered insubstantial by this

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[55]In *Chandler v. South Bend Community School Corporation*, CA. No. 71S51 (N.D. Ind. August 26, 1971), the Court issued a permanent injunction restraining a school board from suspending children whose parents failed to pay textbook fees or execute "inability (to pay) forms." The Court reasoned that the right to receive an education is a personal fundamental right belonging to the student and that any state interference with that right required a substantial burden of justification. The Court concluded that the suspension of the students because of the failure of their parents to pay the required fees denied them equal protection of the law; in *Williams v. Page*, 309 F. Supp. 814, rev'd. No. 18536 (7th Cir. 1971) (unreported), *cert. den.* 404 U.S. 1005 (1971) poor children were denied participation in school sponsored or sanctioned extra graduation activities solely because they were unable to pay the required fees. The District Court found the classification to be due to the disparity of wealth in our society and not to the deliberate attempt by the State to set one group apart [as did the majority in the instant case] and dismissed the complaint. The Court of Appeals, finding the constitutional claim to be substantial, reversed and remanded the case to the District Court.

Court's holding in *Dandridge v. Williams*, 397 U.S. 471 (1970). *Dandridge* involved a dilution of welfare benefits whereas in the instant case the denial of textbooks, which appellees have conceded are "necessary" and "essential to a quality education program," effectively bars appellants' children from receiving an adequate public education. In *Dandridge*, this Court found the challenged regulation free from invidious discrimination and rationally supportable on at least four grounds. Here there has been no showing to justify the deprivation, as we have demonstrated in our previous argument.

More importantly, however, the classification in this case, unlike *Dandridge*, burdens public education, a fundamental interest, and the constitutionally protected right to acquire knowledge.[56] See, *Meyer v. Nebraska, supra*, 262 U.S. at 390. In addition, classifications based on wealth are traditionally suspect and disfavored criteria by this Court. *Harper v. Virginia Board of Elections*, 383 U.S. 663. In *Shapiro v. Thompson*, 394 U.S. 618, the Court, in dictum, indicated that certain wealth discrimination in the area of education would be unconstitutional and that a state could not, for example, "reduce expenditures for education by barring indigent children." Judge Kaufman, dissenting in the Court below, recognized the actuality of the deprivation when he stated:

> "The fees required by New York here as a prerequisite to the distribution of textbooks, according to evidence presently in the record, range from $6.00 to $58.50 per household, and effectively bar plaintiff's children from receiving an adequate public education." (A-80).

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[56] The majority opinion in *Dandridge*, 397 U.S. at 484, cites *Shelton v. Tucker*, 364 U.S. 479 (1960) as the examplar of the Court's special commitment to a special view of equal protection in those areas where "freedoms guaranteed by the Bill of Rights" may be affected. In *Shelton*, Mr. Justice Stewart, for the majority had declared that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." 364 U.S. at 487.

Recently, in *Graham v. Richardson, supra,* 91 S.Ct. at 1854 (1971), this Court declined to rely on the holding of *Dandridge* in a case involving denial of welfare benefits to aliens. The Court stated:

> "The classification involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired. Appellants' attempted reliance on *Dandridge v. Williams* [citations omitted] is also misplaced, since the classification involved in that case [family size] neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion."[57]

The Court below, in extending the holding of *Dandridge* to justify the conditioning of a fundamental interest upon the payment of a fee, necessarily had to disregard the unbroken line of decisions by this Court expressly rejecting such classifications. It rejected the precedental value of *Boddie v. Connecticut,* 401 U.S. 371, and *Griffin v. Illinois,* 351 U.S. 12, as due process cases. The Court rejected the relevancy of the holdings in *Shapiro v. Thompson,* 394 U.S. 618, and *Harper v. Virginia Board of Elections,* 383 U.S. 663, which both affected fundamental interests, concluding that the "compelling state interest" theory is inapplicable to education.

As we have argued in the previous points, a proper interpretation of *Griffin, Harper,* and *Boddie* requires the con-

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[57] The analysis of the Court below was less than searching and was without benefit of a developed trial record. While the appropriate standard to be applied is the compelling interest standard, it is clear that not even the *Dandridge* standard was satisfied. There was no rational basis upon which to conclude that the denial of textbooks to children in elementary school will foster the study of science, mathematics and foreign languages in secondary school. It also strains rationality to conclude that the state's interest in conserving fiscal resources if furthered by a scheme that distributes textbooks to children in grades 7-12, irrespective of their financial need, while denying textbooks to children in grades 1-6 too poor to pay rental fees.

clusion that their rationale is applicable to classifications which deprive children of an adequate public education solely because of their poverty. At a minimum, the only conclusion the Court of Appeals could have reached on the claim presented was that the constitutional challenge was still an open question.

While the requirements of three judge courts may entail a serious drain upon the federal judicial system which Congress may choose to rectify in the future, the problems will not be resolved by federal courts refusing to hear substantial constitutional claims.

CONCLUSION

The Court should hold that New York State may not, consistent with the obligations imposed upon it by the equal protection and due process clauses of the Fourteenth Amendment, deny indigent children attending public school textbooks essential for their required instruction solely because of their inability to pay rental fees. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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